82-1363

No. _____

In The
Supreme Court Of The United States

MARCH TERM, 1983

HERBERT R. SILVER, d/b/a
ALLIED BOND AND COLLECTION AGENCY
Petitioner

v.

BRIAN J. WOOLF, IN HIS CAPACITY AS ACTING
BANKING COMMISSIONER OF THE
STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Does §42-127a(a)(3) of the Connecticut General Statutes, requiring a license of an out-of-state collection agency as a condition of collecting accounts from Connecticut consumer debtors on behalf of foreign creditors exclusively in interstate commerce, violate the Commerce Clause of the United States Constitution on its face or as applied?

Was summary judgment properly granted against the Petitioner where the claim was made that the cumulative effect of multiple and inconsistent state licensing laws on a collection agency seeking to collect debts in each of the fifty states from a single location would constitute an impermissible burden on interstate commerce?

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The Opinion of the Court of Appeals, attached hereto in Petitioner's Appendix, ("P. App") at Page 1A, is reported at 694 F. 2d 8 (2nd Cir. 1982). The Opinion of the District Court, attached hereto at P. App. 15A, is reported at 538 F. Supp. 881 (D. Conn. 1982).

JURISDICTION

The Decision of the Court of Appeals was entered on November 15, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Commerce Clause of the U.S. Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The Statute involved, C.G.S. §42-127a(a)(3) provides:

> "(a) No person shall act within the State as a consumer collection agency, unless such person holds a license then in force from the commissioner authorizing him so to act. A consumer collection agency is acting within this State if it . . . (3) has its place of business located outside this State and regularly collects from consumer debtors who reside within this State for creditors whose place of business is located outside this State."

Other relevant portions of Chapter 739 of the Connecticut General Statutes, dealing with the licensing and regulation of consumer collection agencies, are set forth at P. App. 37A to 48A. Also set forth at P. App. 49A is the pre-emption provision of the Fair Debt Collection Practices Act, 15 U.S.C. 1692n.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The Petitioner, Herbert R. Silver, d/b/a Allied Bond and Collection Agency ("Allied"), does business as a collection agency throughout the 50 states and in several United States territories and foreign countries from its sole office in Trevose, Pennsylvania. It has contacted debtors in Connecticut on behalf of creditors from states other than Connecticut since prior to 1978. Although Allied is typically unaware of the purpose for which any debtor it contacts on behalf of a client has incurred indebtedness, it does not dispute that many of such debtors are "consumer debtors" as that term is defined in §42-127(d) of the Connecticut General Statutes. Accordingly, Allied is a "consumer collection agency" as that term is defined in C.G.S. §42-127(b).

Without exception, Allied's contacts with debtors in the State of Connecticut are carried out through interstate mail and interstate telephone communication from its office in Pennsylvania. Neither Mr. Silver nor any employee of Allied resides or has resided in the State of Connecticut, nor has Allied ever maintained an office in Connecticut. Allied has never maintained a mailing address, post office box, telephone, telephone listing or bank account in the State of Connecticut, nor has it ever sent an employee, agent or other representative into the State for any purpose. It does not utilize any independent contractor within the State for any purpose. Allied has never solicited companies located within the State of Connecticut as clients, and has no clients with principal offices in the State. Allied owns no real or personal property of any kind in Connecticut, and none of the money it collects on behalf of clients is forwarded to the State.

As of December 14, 1981, Allied had some 3,422 open or active files concerning debtors located in the State of Connecticut. These accounts represented at that date less than 2% of the total accounts referred to Allied for collection by its clients.

Prior to the second quarter of 1981, Allied represented the Atlantic Richfield Oil Company (ARCO) and the Mobil Oil Corporation with respect to certain past-due accounts of those companies regarding customers residing in Connecticut. Employees of the Respondent State Banking Commissioner (the "Commissioner") contacted Mobil in January of 1981 and ARCO in May of 1981 and advised each that:

> "Section 42-131a(b) of Title 42, Chapter 739 of the Connecticut General Statutes prohibits a creditor ... from engaging the services of a collection agency that is not licensed as such by the Banking Commissioner."

Shortly thereafter, the Commissioner also contacted the Shell Oil Company to the same effect. As a result of those communications, all three companies have terminated Allied's representation of them with respect to previously forwarded accounts of debtors located in the State of Connecticut, and each has ceased the forwarding of new accounts pending a resolution of this matter. All have indicated to Allied that such action was taken solely as a result of the action of the Commissioner, and none have taken any such action with respect to debtors located in other states. Withdrawal of business by ARCO, Mobil and Shell has reduced Allied's volume of business in the State of Connecticut by more than 50%.

During the more than five years during which Allied has contacted debtors residing in Connecticut, the Commissioner has received a total of six complaints regarding Allied. In each case in which the Commissioner has sought

an explanation from Allied as to the facts of a complaint, a detailed written answer was received. In no case has the Commissioner taken any action with respect to a complaint against Allied after receiving Allied's response. Allied operates in full compliance with the laws of the Commonwealth of Pennsylvania, which do not presently require collection agencies to be licensed as such. Allied has never been required to obtain a license in order to conduct its business with respect to debtors located in any other state, and has no such licenses.

Allied's records are maintained exclusively at its office in Trevose, Pennsylvania, and essentially all of such records have been computerized. Certain of the computer programs used in such record keeping permit information to be segregated on a state-by-state basis, but many do not and Allied does not customarily keep records on that basis. Even where information for a specific state can be obtained, the process is time-consuming and expensive.

B. THE PROCEEDINGS BELOW

On September 14, 1981, the Commissioner issued a Notice of Hearing to Allied, ordering Allied to appear and show cause why it should not be ordered to cease and desist from continuing its business without obtaining a Connecticut license. An Administrative Hearing was held on November 4, 1981, at which time the State Banking Department's Hearing Examiner declined to consider the constitutional issues raised by Allied. This action was then filed in the United States District Court for the District of Connecticut on November 10, 1981, seeking declaratory and injunctive relief. The District Court properly exercised jurisdiction thereof pursuant to 28 U.S.C. 1331 and 1332.

Shortly after the commencement of the action, the Commissioner filed a Motion for Summary Judgment, which was consolidated for argument with Allied's Motion for a Preliminary Injunction. The District Court granted

Summary Judgment in favor of the Commissioner holding, inter alia, that Allied "engaged in substantial intrastate activities." P. App. 25A. The basis for this holding was that although Allied's business was conducted entirely from out-of-state, its business activities produced an impact within the State. Because the District Court regarded Allied as engaged in intrastate commerce, it disregarded the decisions of this Court cited by Allied to the effect that a state cannot impose conditions precedent, in the form of licenses or otherwise, on the right of access to a state of a business engaged wholly in interstate commerce. Instead, the District Court judged the constitutionality of C.G.S. 42-127a(a)(3) on the basis of the balancing test as enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and concluded that the state interests outweighed the burden on interstate commerce.

The District Court further held that the cumulative burden imposed upon a national agency by multiple and inconsistent State licensing provisions did not violate the Commerce Clause, finding that the purpose of the Commerce Clause was to protect interstate markets and not particular interstate firms.

The Court of Appeals affirmed the District Court's grant of Summary Judgment on different grounds. It held that this Court's decisions in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974) and other cases, prohibiting a state from imposing conditions on the access of an interstate business, were distinguishable. It further held that the non pre-emption provision of the Fair Debt Collection Practices Act, 15 U.S.C. 1692n, was "more than sufficient to authorize the licensing of interstate debt collection agencies as a method of enforcing otherwise valid regulatory measures." P. App. 12A. While acknowledging that "local interests may be insufficient to justify state legislation which, because it differs from the laws of other states, significantly burdens commerce" and concluding that 15 U.S.C. 1692n does not authorize such multiple or inconsistent state regulation, the Court of Appeals also found that Allied's claim of harm resulting from multiple state regulation was "totally speculative." P. App. 13A.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

1. The Decision Of The Court Of Appeals Is In Conflict With The Line Of Cases Represented By *Allenberg Cotton Co. v. Pittman.*

The decision of the Court of Appeals should be reviewed by this Court because it is in conflict with a series of decisions by this Court, the most recent of which is *Allenberg Cotton Co. v. Pittman, supra.*

In its decision, the Court of Appeals upheld the constitutionality of a Connecticut statute which requires an out-of-state collection agency to obtain a license before communicating with Connecticut debtors exclusively through interstate mail and telephone. In *Allenberg* and the cases preceding it, this Court consistently rejected state attempts to restrict the access of companies engaged wholly in interstate commerce by imposing licensing or domestication requirements. Such requirements have been disallowed without regard to the legitimacy of the state objective sought to be furthered thereby, because licensing has been thought to impose obstacles on the conduct of national commerce beyond the authority of the states to impose — in effect, the national interest in free interstate commerce per se outweighs the interest of a state in using a licensing or domestication requirement as a means of enforcing its laws.

Licensing and domestication have been allowed only in those cases where the in-state activities of an interstate business are such as to fairly allow it to be characterized as "localized." Compare, *e.g.*, *Allenberg* with *Eli Lilly & Co. v. Sav-On Drugs, Inc.*, 366 U.S. 276 (1961), and see L. Tribe, American Constitutional Law 341 at nn. 7-8 (1978). "Localization" has always been held to require some tangible physical presence in the state.

In *Allenberg*, this Court rejected the suggestion that the extent of the burden on commerce imposed by a state's licensing requirement should be balanced against the significance of the state objective in requiring licensing. This case presents no different issue, but presents it in a new context. The licensing requirement sought to be imposed here is directed at collection agencies, not foreign corporations in general or grain dealers as in *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925), express companies as in *Adams Express Co. v. New York*, 232 U.S. 14 (1914), or drummers as in *Robbins v. Shelby Taxing District*, 120 U.S. 489 (1887). The result which this Court is asked to review arises from the efforts of the District Court and Court of Appeals to avoid the thrust of this Court's decisions, when applied to a law-abiding business involved in an industry with a poor public image. The reputation of collection agencies is not the issue. The issue is whether this Court's often repeated judgment that states may not erect barriers to the simple access of interstate business is to be preserved.

The Petitioner does not seek freedom from state regulation. Indeed, as a legitimate participant in an industry too often guilty of abuse and misconduct in the past, Allied recognizes that it has much to gain from state regulation of collection practices, vigorously enforced. What Petitioner has sought is simply protection of its exercise of the national privilege to engage in interstate commerce free of state restrictions on its access to the

marketplace. The failure of the courts below to protect this privilege, notwithstanding this Court's consistent support therefor, is the occasion for this Petition.

In *Allenberg*, the plaintiff was a cotton merchant with offices in Tennessee. Through the auspices of an exclusive agent in Mississippi, and occasionally through its own employees, it contracted directly with several Mississippi farmers for the purchase of cotton to be grown in the season to come. Consistent with practice in the industry, it also entered into contracts for the sale of that cotton to other customers outside of Mississippi after the cotton had been ginned, sorted, graded, processed and stored in the state. When Pittman, one of the farmers with whom Allenberg had contracted, refused to deliver the cotton, Allenberg brought suit in Mississippi to enforce its contract.

This Court held Mississippi's "door closing" statute, denying access to the courts of the state to companies transacting business in the state without a Certificate of Authority, to be unconstitutionally applied to Allenberg. After a review of Allenberg's contacts with the State of Mississippi and the cotton marketing system employed nationally, this Court concluded "Appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business." 419 U.S. at 33.

In so holding, this Court relied explicitly on the well-developed exception to the general power of a state to regulate foreign commerce occurring within its borders — that a state cannot, consistently with the Commerce Clause, condition access to its markets upon obtaining of a license or a certificate of authority to conduct business. Justice Frankfurter traced the development of the exception — which he considered "as important and complex as the original doctrine" — to *Pensacola Tel. Co. v. Western*

Union Tel. Co., 96 U.S. 1 (1877). F. Frankfurter, *The Commerce Clause* 64 (1937). Professors Tribe and Antieau recognize its continued vitality today:

> "A license or qualification to do business in the state may *not* constitutionally be required of a corporation that seeks to enter a state solely to engage in exclusively interstate commerce there;" Tribe, *American Constitutional Law* 342 (1978) (emphasis in original).
>
> "The United States Supreme Court has a number of times ruled that a corporation of one state may enter into all other states for all purposes of interstate commerce without obtaining permission of the latter, and that any statute of the second state that attempts to bar or burden the exercise of this national privilege is repugnant to the Commerce Clause and void." 2 Antieau, *Modern Constitutional Law*, §10.35 at pages 71-72 (citations omitted).

The Court of Appeals viewed *Allenberg* in isolation rather than as the latest exposition of this principle. Treating it this way, the Court of Appeals attempted to distinguish *Allenberg* on the ground that "the contacts between Allied's business and Connecticut are significantly different from those involved in *Allenberg.*" (P. App. 7A).

The principal difference identified by the Court of Appeals was that "unlike *Allenberg*, the licensing scheme here is an integral part of a precise regulatory scheme." (P. App. 8A). Petitioner submits that this is a distinction without a difference, and that the Court of Appeals incorrectly characterized licensing as integral to Connecticut's regulatory scheme.

Although state domestication statutes apply to foreign corporations without regard to the business engaged in by each, the state objectives sought to be obtained by domestication are also part of a regulatory scheme. *See* discussion at 419 U.S. 40-1 and *Eli Lilly, supra,* at 284n.1. This Court has not previously distinguished between licensing or domestication of foreign corporations generally, and of specific interstate businesses, and the rationales for this Court's decisions do not suggest that such a distinction is of constitutional dimension.

Less than a year ago, four Justices of this Court agreed that, among its other infirmities, Illinois' tender offer statute was unconstitutional as a direct burden on interstate commerce under the standard set forth in *Shafer v. Farmers Grain Co., supra. Edgar v. Mite Corporation,* 457 U.S. ____, 102 S. Ct. 2629 (1982). In *Shafer,* this Court struck down a North Dakota statute which specifically regulated the buying and shipping of wheat and imposed a license requirement to engage in that business. Similarly, in *Adams Express Co. v. New York,* this Court held:

> " . . . if (the challenged sections of the New York City Charter) are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that as construed they would be clearly unconstitutional." 232 U.S. at 30-31.

In these cases and many others, this Court has refused to allow licensing even when the need for state regulation was clearly established in the context of a "precise regulatory scheme." The rationale of these cases — that the national interest in the free flow of commerce will always take precedence over any state interest in imposing conditions precedent on the conduct of interstate commerce — is equally applicable here.

Nor may Connecticut's licensing provision be fairly characterized as integral to the enforcement of its system of regulation of collection agencies, domestic and foreign. The Commerce Clause prohibits Connecticut from requiring a license of Allied before it can conduct its business in interstate commerce, but the State retains ample means of enforcing its regulations concerning the manner in which that business or any other business is conducted.

The Connecticut statutes regulating the substantive conduct of a collection agency business, and setting forth the remedies available to the Commissioner for a violation thereof, are set forth in P. App. 37A-48A. An agency violating any of the substantive standards set forth in §42-131 can be ordered to cease and desist from violations, and violations of any such order are punishable by contempt, §42-131b. Section 42-131c gives the Commissioner power to seek additional injunctive relief and additional sanctions, and §42-131d explicitly provides that the statutory enforcement measures are in addition to such other remedies as the Commissioner may possess.

Moreover, Congress has adopted, at 15 U.S.C. §1692 et seq., the Fair Debt Collection Practices Act. In explicit and mandatory terms, that statute also defines minimum standards of conduct for collection agencies engaged in both interstate and intrastate commerce. The Federal statute provides for private civil enforcement, with remedies including punitive damages and actual attorneys' fees, and expressly permits class actions. It is enforceable as well by the Federal Trade Commission, which has at its disposal all of the enforcement powers granted to it in the Federal Trade Commission Act. 15 U.S.C. §1692b-1692l; 15 U.S.C. §41 et seq.

In *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1955), the State of Illinois sought to suspend an interstate motor

carrier's right to use Illinois highways for violations of Illinois motor vehicle laws. This Court held that the suspension was inconsistent with the Federal Motor Carrier Act, and responded to the State's argument that suspension was a necessary incident of state regulation as follows:

> "It is urged that without power to impose punishment by suspension states will be without appropriate remedies to enforce their laws against recalcitrant motor carriers. We are not persuaded, however, that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks." *Id* at 64.

This Court was not persuaded in *Castle* that licensing was an essential part of the State's regulatory scheme, and in light of the other remedies available to the State, licensing can hardly be thought more vital here. Licensing in an instance such as this is simply one of many enforcement tools. While it may be an effective tool, its implications for the free flow of commerce are such that this Court has historically denied states the right to impose such conditions on access of an interstate business, even for valid purposes.

Indeed, the real distinction between this case and *Allenberg* is that the Mississippi statute in *Allenberg* imposed a condition on the access of an interstate business to the courts of the state, while the Connecticut statute here denies access to the State in full unless the license is obtained. Since *Allenberg* and the line of cases it represents make it clear that the legitimacy of the State's objective is not to be balanced against the burden imposed by a particular qualification or licensing statute (the position argued by Justice Rehnquist in dissent in *Allenberg*), the distinction between a statute seeking to impose conditions only on a specific industry and a qualification statute applying to all foreign corporations is not a meaningful one.

The only decision of this Court cited by the Court of Appeals in support of its conclusion concerning the applicability of *Allenberg* to this Statute is *Robertson v. California*, 328 U.S. 440 (1946). Unlike *Allenberg*, however, *Robertson* is not illustrative of a general principle but is essentially unique.

At issue in *Robertson* was the criminal conviction of a resident agent for selling the insurance policies of an Arizona insurer not admitted to engage in an insurance business in California. Robertson's conviction stemmed from his activities within the State of California, and the two statutes under which he was convicted both purported to govern only conduct actually occurring within the State. 328 U.S. at 444-449. This Court did intimate in dictum, however, that if California's right to license an out-of-state insurance company had been at issue, it would have upheld that right. It is not certain to what extent this conclusion rested on the existence of resident agents in the state, but it is clear that it was compelled by the historically unique status of the insurance industry.

Shortly before the acts which led to the criminal conviction in *Robertson*, this Court decided *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *South-Eastern Underwriters*, this Court held that the insurance business did constitute interstate commerce — thereby limiting what had been generally thought to have been the reach of state regulatory power, and subjecting insurance to the paramount regulation of the federal government.

Congress quickly responded to the *South-Eastern Underwriters* decision, adopting the McCarran-Ferguson Act, 15 U.S.C. 1011 et seq., on March 9, 1945. The effect of that statute was to give congressional consent to State regulation of insurance notwithstanding the limitations of the Commerce Clause. The ability of Congress to so consent was considered and upheld in a companion case to *Robertson* decided the same day, *Prudential Insurance Co.*

v. Benjamin, 328 U.S. 408 (1946). In *Prudential*, the Court referred to that case and the *Robertson* case as "not unexpected sequels" to the *South-Eastern Underwriters* decision, and noted that "No phase (of the process of accomodating state and national power over interstate commerce) has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. Their solution cannot escape its influence." 328 U.S. at 413.

The acts complained of in *Robertson* took place in the interim between the *South-Eastern Underwriters* decision and the adoption of the McCarran-Ferguson Act. This Court in *Robertson* was therefore called upon to determine the status of state regulation during that interim, and indeed of all regulatory actions taken prior to the adoption of the McCarran-Ferguson Act in reliance on the notion that the insurance business was not commerce, and state regulation was therefore free of the restrictions imposed by the Commerce Clause.

The Court was thus confronted with a case which threatened to jeopardize years of uninterrupted and unquestioned State regulation of the insurance industry, while such regulation was believed to be free of Commerce Clause restraints. Attentive to the historically unique status of State regulation of insurance,[1] interrupted briefly by the *South-Eastern Underwriters* decision and restored by the McCarran-Ferguson Act, and focusing on the need for substantive regulation of insurance policies, the Court affirmed the conviction of an agent engaged "in his localized pursuit of this phase of the comprehensive process of conducting an interstate insurance business." 328 U.S. at 448-449 (citation omitted).

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[1]The special status of insurance industry regulation dates at least from *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Cf. *Robertson, supra*, at p. 445, n.6.

The case, in short, is so dependent on its particular historical context — in the seam between *South-Eastern Underwriters* and the McCarran-Ferguson Act — and the unique position of the insurance industry that this Court has never cited *Robertson* in any other context or for any more general proposition, notwithstanding many opportunities to do so (e.g., *Allenberg* and *Eli Lilly*), had it been thought to have any application outside the confines of the insurance business.

The Court of Appeals cited no other decision of this Court in support of its attempt to distinguish *Allenberg* and its predecessors. Contrary to its conclusion, these cases do establish a limited per se rule of continuing validity and purpose, which should have governed the result in this case.

2. The Decision Of The Court Of Appeals Is In Conflict With Decisions Of This Court Concerning Congressional Consent To State Legislation Restricting Interstate Commerce.

The Court of Appeals further sought to distinguish *Allenberg* on the basis that Congress had specifically authorized stronger state regulation of collection agencies in the Fair Debt Collection Practices Act, 15 U.S.C. §1692n (P. App. 49A). The conclusion of the Court of Appeals is entirely unsupported by the legislative history of 15 U.S.C. §1692n, however, and so contrary to recent decisions of this Court concerning congressional consent to state action concerning interstate commerce, as to call for this Court's review.

As set forth in *New England Power Co. v. New Hampshire*, ____ U.S. ____, 102 S. Ct. 1096 (1982):

> "The dispositive question ... is whether Congress has in fact authorized the states to impose restrictions of the sort at issue here." ___ U.S. at ___, 102 S. Ct. at 1101.

The legislative history of the Fair Debt Collection Practices Act is silent on the question of state licensing of collection agencies. Far from intending to authorize such licensing, both the House and the Senate seem clearly to have understood that federal legislation concerning debt collection was necessary precisely because the states lacked constitutional authority to compel the domestication of interstate agencies.

Thus, the House Report on the legislation notes that:

> "State laws do not and cannot regulate interstate debt collection practices. The advent of the WATS telephone line has multiplied the number of interstate debt collection abuses. A debt collector can harass a consumer with impunity by calling from one State into another." H. Rep. 131, 95th Congress, First Session, at P. 3.

Similar language is contained in the Senate Report, S. Rep 382, 95th Congress, First Session, at pp. 2-3. Both reports focus on the then-inadequacy of many state laws in defining prohibited practices, on the value of defining federal standards, and on creating a federal private right of action for their violation as a solution to the problem. Neither Report, nor any statement made on the floor of the House or Senate during the consideration of the bill, suggests that licensing was ever considered, let alone intended to be authorized.

Indeed, the District Court specifically found that §1692n was a "standard non pre-emption clause," such as this Court held in *New England Power Co., supra*, should "not ... be construed as an affirmative grant of power to the states to burden interstate commerce in the absence of

an express statement of congressional intent to sustain legislation from attack under the Commerce Clause." (P. App. 28A n.5). In his Brief to the Court of Appeals, the Respondent also specifically conceded that Congress had no such intent.

This Court has recently stated:

> " . . . when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co. v. New Hampshire*, ___ U.S. at ___, 102 S. Ct. at 1102-3.

The Court of Appeals' conclusion regarding the effect of 15 U.S.C. §1692n is based on no more than such speculation. Such a casual construction of a standard non pre-emption clause has ramifications beyond the interpretation of the particular statute, and accordingly should invite this Court's review.

B. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SPECIFICALLY ADDRESSED BY THIS COURT.

Finally, the Court of Appeals concluded that Allied had made an insufficient showing of the cumulative burden imposed by multiple and inconsistent state licensing laws, if Connecticut's provision was upheld, to withstand a motion for summary judgment. That determination, in an important and complex case, contradicts numerous decisions of this Court as well as other Courts of Appeals concerning the permissible scope of a summary judgment.

Among the facts alleged by Allied and assumed true for the purposes of the motion, *Bishop v. Wood*, 426 U.S. 341 (1976), were that Allied conducts business in all fifty states from a single office in Pennsylvania; that its records are computerized and not segregated on a state-by-state basis; that in some instances, state-by-state information cannot be obtained, and in each instance where it can be obtained, the process is lengthy and expensive; and that prior to the action of the Commissioner, Allied had not been compelled to be licensed in any state in which it operates similarly.

At the combined hearing in District Court on Petitioner's Motion for Preliminary Injunction and Respondent's Motion for Summary Judgment, the District Judge indicated he did not wish to hear testimony on any matter concerning the motions. In District Court and in the Court of Appeals, Allied cited the twenty-seven states which at that time specifically required collection agencies to be licensed, and also cited the seven additional states which at that time required licensing more generally or in specific locations within the state. Certain specific provisions of Arizona's licensing statute were also discussed, including the requirements that in order to obtain an Arizona license, each collection agency must maintain an office in the state and a bank account in the state, into which all collections from Arizona debtors must be deposited. The Court of Appeals was invited to take judicial notice of the complexity and variety of the licensing requirements of these states, and had the right and the obligation to do so. 28 U.S.C. §1783.

Allied consistently contended below that multiple state licensing imposes administrative burdens on the conduct of its business as direct if not as immediate as the burdens imposed by the tender offer statute struck down by this Court in *Edgar v. Mite Corporation, supra.* Every agency conducting business in states where it maintains neither offices nor agents will be similarly affected by such

multiple licensing. Since the Court of Appeals agreed that "local interests may be insufficient to justify state legislation which, because it differs from the laws of other states, significantly burdens commerce" (P. App. 13A), and since it did not believe that 15 U.S.C. §1692n could be read to authorize state legislation "which in the aggregate might effectively prohibit interstate debt collection agencies from operating" (P. App. 13A), the Court of Appeals should have remanded the matter to the District Court for a trial on the merits, at which time a fuller showing of the potential disruption of the consumer credit market could and would have been made.

Petitioner recognizes, of course, that this Court does not sit as a Court of Errors. If the only issue presented by the decision of the Court of Appeals was the affirmance of a summary judgment notwithstanding the existence of substantial issues of fact, this Petition would not have been brought. But as this Court has previously held, issues as substantial as those involved in this case should not be resolved by summary procedures where a fuller exposition of facts upon which proper findings can be based would be provided by trial or stipulation of facts. *Askew v. Hargreave*, 401 U.S. 476 (1971) (per curiam); *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). Given the importance of the issues presented here and the paucity of the record on which the District Court and Court of Appeals sought to decide them, the grant of a summary judgment in this case is an important subject for this Court's review.

CONCLUSION

For all of the foregoing reasons, petitioner requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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